

No. 2714

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ONG SEEN, alias ONG CHUNG LUNG,

*Appellant,*

VS.

ALFRED E. BURNETT, Inspector in Charge,  
United States Immigration Office, at  
Tucson, Arizona,

*Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

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**Filed**

JUN 5 - 1916

*Filed this.....day of June, 1916.*

**F. D. Monckton,**  
Clerk

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*



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## APPELLANT'S PETITION FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

The appellant, Ong Seen, alias Ong Chung Lung, respectfully petitions this Honorable Court to grant to him, the said apepllant, a rehearing upon the errors assigned in the above appeal and more particularly of the error assigned upon this appeal in the admission in evidence and consideration by the Secretary of Labor of the ex parte affidavits of Sterling C. Robertson and Louis W. Lowenthal.

And the said apeeplant, by his counsel, of the alleged error so assigned, respectfully submits to this Honorable Court:

At the hearing, the ex parte affidavits of the two persons above named were put in evidence. These affidavits were to the effect that the appellant at the time of his arrest and for some time prior thereto had been a waiter and general helper in a Chinese restaurant at Mesa, Arizona, having been a regular employee of the restaurant. Upon these affidavits the finding that the appellant was and had been a waiter for some time prior to his arrest is based.

It is deemed by counsel for the appellant desirable that a uniform rule of procedure be established for the Ninth Circuit with reference to departmental hearings. It has been the custom of departmental officials in summary hearings to receive ex parte affidavits and upon such ex parte affidavits base their findings. To the end that a clear pronouncement of the law may be had from this Court which may thereafter guide the departmental officials as well as counsel for the aliens, this rehearing is sought.

If the reception in evidence of these ex parte affidavits referred to contravened a fundamental principle of our system of jurisprudence; if the reception in evidence of the affidavits was a denial of due process of law, then the hearing before the department was not a fair hearing.

The Circuit Court of Appeals for the Eighth Circuit in no doubtful language condemned the practice here adverted to and declared that the reception of ex parte affidavits at such a hearing was in effect a denial of due process of law and a denial of a fair hearing.

For the purpose of this petition, we can lend no force by argument to the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Whitfield v. Hanges*, 222 Fed. 748-749, wherein it was held:

“Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused *shall be notified of the nature of the charge against him* in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, *cross-examine the witnesses against him*; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and *based upon the evidence at the hearing*, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it.”

The rule laid down in that case by the Circuit Court of Appeals for the Eighth Circuit, has established what we consider to be the true rule of procedure with reference to departmental hearings, and excludes the reception of ex parte affidavits, the introduction and reception of which can not but be

a denial of due process of law to defendants in this class of cases.

Excluding these ex parte affidavits from the record in this case, there is no evidence that appellant performed any manual labor. That the decision reached by the Department of Labor in ordering the deportation of appellant must have been based upon these affidavits, is borne out by the statement of the case recited in the opinion of this Court:

“In March, 1914, he was seen working in a restaurant where it appeared that he worked as an employee for a period of three or four weeks.”

This did not appear from any evidence in the case except the ex parte affidavits above mentioned.

Stripped of that “evidence” there is no evidence in this case upon which the Commissioner of Labor could find that appellant was unlawfully in the United States. We respectfully submit that the conclusion reached by this Honorable Court as set forth in its opinion in this case that:

“There is evidence which we think might justify the Immigration officers in believing, as no doubt they did believe, that the appellant never in fact belonged to the merchant class”,

is not borne out by the evidence presented in the record. The uncontroverted evidence is that appellant did become a merchant; that he was a bona fide member of the firm of Doap Leun Hong & Co., and that he was such for at least one year prior to his departure for China.

Appellant bases his right to remain in the United States not alone upon his original entry in 1906, but as well upon his subsequent entry in 1913. If the subsequent entry as well as the original one was lawful and appellant has not since the latter entry committed any act depriving him of the right to remain here acquired by reason of such entry, he can not now be deported as a penalty for the mere delay in entering upon his occupation of merchant after his original entry. That the original entry was a lawful one, there is no evidence to dispute. The mere delay on the part of appellant in taking up the occupation of merchant thereafter at most was only a circumstance upon which the Department of Labor might have sought to deport him at the time as being unlawfully in the United States because of what might be termed the non-user of the right accorded him by reason of the lawful entry, and it does not in any way controvert the fact that appellant did later become a bona fide merchant. So in the light of this analysis of the evidence it appears that the basis of the Commissioner's belief "that appellant never in fact belonged to the merchant class" was merely a suspicion engendered by the delay on the part of appellant in taking up his occupation as merchant.

Section 2 of the Act of 1893 provides, *inter alia*:

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than

Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

The evidence adduced by the Department itself all tends to prove that such entry was a lawful one, i. e., the preinvestigation of appellant's status as a merchant upon his departure for China in 1912, and the landing record upon his return in 1913, the former containing the testimony of three white witnesses, namely, H. A. Page, Daniel A. McNulty and B. M. Poetz, that appellant was engaged in a bona fide mercantile endeavor for at least one year prior thereto. That evidence established appellant's status as a merchant "for at least one year before his departure from the United States," and the record discloses nothing which even casts suspicion upon such status. We are not concerned with the question of whether a person unlawfully within the United States in the beginning can subsequently acquire a legal status which will entitle him to remain, for that question is not presented here. We are here concerned only with the question of a Chinese person being lawfully admitted to the United States subsequently acquiring a status which entitles him to remain, unless he has since committed some act which caused him to lose the status

thus acquired. Even a laborer, whose entry into the United States was not an unlawful one, although subsequently he may have lost his right to remain and might in the meantime be subject to deportation as being unlawfully within the United States, may subsequently acquire a status as a merchant which will give him the right to remain.

Ex parte Ow Guen, 148 Fed. 926;

Bouve, Exclusion and Expulsion of Aliens in the United States, 352.

That appellant was lawfully admitted to the United States and that while lawfully here he acquired a status as a merchant, the record in this case fully discloses, and that he was lawfully re-admitted to the United States in 1913 upon his status as a merchant for at least one year prior to his departure for China in 1912, is also fully disclosed by the record. He must therefore be entitled to remain in the United States unless he has lost his status as a merchant subsequent to his return in 1913. *That he has lost this status is only made to appear if at all by the ex parte affidavits complained of.*

For this reason appellant contends that the alleged error of the admission in evidence and consideration by the Secretary of Labor of the ex parte affidavits of Robertson and Lowenthal more clearly appears, and that because of such error appellant was not accorded a fair hearing upon the question of his right to remain in the United States.

Wherefore appellant respectfully urges a rehearing of his appeal herein by this Honorable Court.

Dated, San Francisco,  
June 5, 1916.

Respectfully submitted,  
JOHN L. McNAB,  
STRUCKMEYER & JENCKES,  
*Attorneys for Appellant  
and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

JOHN L. McNAB,  
*Of Counsel for Appellant  
and Petitioner.*